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IN THE SUPREME COURT

FOR THE STATE OF MICHIGAN

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG, Subrogee of the University of Michigan Regents,

Plaintiff/Appellant,

v

CECIL R. LAWSON and AMERICAN BEAUTY TURF NURSERIES, INC.,

Defendants/Appellees.

Supreme Court Docket No. 122938

COA No: 237284

Washtenaw Circuit Court No: 99-11061-CZ

BRIEF OF AMICUS CURIAE, THE DETROIT EDISON COMPANY

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BRIEF OF AMICUS CURIAE,
THE DETROIT EDISON COMPANY

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Detroit Edison Company generates and distributes electricity to 2.1 million customers in southeastern Michigan (including the Detroit area), operating some 44,000 circuit miles of distribution lines. As an investor-owned public utility company, the Detroit Edison Company has settled literally hundreds of cases in which it sought an aliquot share of the common liability from other tortfeasors. As a result, the proper assessment of the right to contribution under both the common law and statute is a question of immense jurisprudential interest to the Detroit Edison Company. Accordingly, the resolution of the issues involving the contribution doctrine presently before the Supreme Court will directly affect the operation of Detroit Edison Company in maintaining public utility rates at reasonable levels in the public interest.

The present motion to intervene as an amicus curiae is not prejudicial to any party as the Detroit Edison Company is simply setting forth the law as it has evolved over the past three decades since this Court's decision in Moyses v Spartan Asphalt Paving Co, 383 Mich 314, 174 NW2d 797 (1971), overruled in part on other grounds in Hapner v Rolf Brauchli, Inc, 404 Mich 160, 182, n 5 273 NW2d 822 (1978). In short, the Detroit Edison Company, in seeking to inform the Supreme Court about the nature of the contribution doctrine, wants to draw the attention of the Justices to the long-standing existence of the right to contribution under both the common law and statute for the purpose of a proper determination of the issues before them.

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STATEMENT OF JURISDICTION

Amicus Curiae, the Detroit Edison Company, concurs in the Statement of Jurisdiction in the Brief of Plaintiff-Appellant in this matter.

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COUNTER-STATEMENT OF QUESTION PRESENTED

I. **DOES THE RIGHT TO CONTRIBUTION EXIST IN MICHIGAN WHERE A TORTFEASOR AMICABLY SETTLES WITH THE PLAINTIFF?**

Plaintiff-Appellant says: "Yes."

Defendants-Appellees say: "No."

Amici Curiae says: "Yes."

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STATEMENT OF FACTS

In the interest of avoiding any redundancy, the within brief of Amicus Curiae, the Detroit Edison Company, adopts the statement of facts set forth in the brief of Brief of Plaintiff-Appellant in this matter.

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ARGUMENT

THE RIGHT TO CONTRIBUTION EXISTS IN MICHIGAN ON THE BASIS OF BOTH THE COMMON LAW AND STATUTE WHEN A TORTFEASOR AMICABLY SETTLES WITH THE PLAINTIFF.

This is the problem the Legislature never envisioned: Whether a tortfeasor can settle amicably with the plaintiff and, because there is no trial and no MCLA 600.6304/MCLA 600.2957 allocation, proceed with a contribution suit to recover the fair share of the settlement attributable to the tortfeasor who refused to settle.

Overlooking that these allocation statutes could be easily construed to require a second suit for the allocation which is a necessary predicate for responsibility sharing, thereby harmonizing MCLA 600.2925a et seq and MCLA 600.6304/MCLA 600.2957, the position of the parties, frankly, overlooks that there is a common law solution to the problem.

In Caldwell v Fox, 394 Mich 401, 417, 231 NW2d 46 (1975), the Court, prompted by the lower courts' misunderstanding of its decision in Moyses v Spartan Asphalt Paving Co, 383 Mich 314, 174 NW2d 797 (1970), overruled in part on other grounds in Hapner v Rolf Brauchli, Inc, 404 Mich 160, 182, n 5, 273 NW2d 822 (1978), "briefly retrace[d] the history of the contribution doctrine to demonstrate the impact of Moyses." In Caldwell, the Court noted:

> The doctrine of contribution had its origin in equity. In Lorimer v Julius Knack Coal Co, 246 Mich 214, 217, 224 NW 362, 363 (1929), this Court discussed contribution:
>
> "It has often been stated by the courts that contribution is founded on principles of equity

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> and natural justice. The doctrine rests on the principle that, when parties stand in aequali jure, the law requires equality, which is equity, and one of the parties will not be obliged to bear more than his just share of a common burden or obligation to the advantage of his co-obligors. 13 C.J. p. 821. It is applied in those cases where one or more of several parties equally obligated have done more than their share in performing a common obligation. 'And one who has paid more than his share of the joint obligation may recover contribution from his cocontractors." Comstock v Potter, 191 Mich 629, 637, 158 NW 102 (1916)."

The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.

A common law exception to the above general rule grew out of the case of Merryweather v Nixan, 8 TR 186; 101 Eng Rep 1337 (1799). The exception was based on a policy decision to deny the right to the equitable relief of contribution to intentional wrongdoers. Prosser, Torts (4th ed), § 50, pp 305-306:

> "The ground of the decision would appear to have been simply the fact that the parties had acted intentionally and in concert, and the plaintiff's claim for contribution rested upon what was, in the eyes of the law, entirely his own deliberate wrong."

The ground of Deliberate or Intentional wrong was broadened by American courts to include negligent wrongs. This unfortunate expansion was occasioned by the liberalization of joinder rules to permit the joinder of one action of all those who were responsible for an indivisible injury. Professor Prosser's comments are typical of the dissatisfaction with this development. Prosser, Torts (2d ed), § 46, pp 248-249:

> "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be

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> shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free. Half a century of vigorous denunciation has had its effect in the passage of statutes in some twenty states, which to a greater or less extent permit contribution among tortfeasors. Some of these acts are limited to contribution between defendants against whom a joint judgment has been rendered. Others are quite broad and general in scope, declaring the principle of contribution and leaving its administration to the courts. Still others provide methods by which the tortfeasor from whom contribution is sought may be joined as a defendant, and his liability determined in the original action. The drafting problem has not been free from difficulty.
>
> "It seems quite clear that the rule denying contribution in favor of negligent tortfeasors is in full retreat, and that in due course of time the pressure of opinion will compel its abolition. As to wilful wrongdoers, or those who are guilty of the more flagrant forms of misconduct, there is no indication of any desire or tendency to relax the original rule." [Footnote omitted; emphasis provided.]

In short, as the Court in Caldwell recognized, the right to contribution in Michigan has always been well-entrenched as an equitable doctrine before American courts as to negligence torts.

However, this judicial enlargement of the exception to include negligent wrongs spawned legislative action to reestablish, by statutory means, the erstwhile equitable right to contribution for other than wilful or intentional tortfeasors. In Michigan, the legislative response produced MCLA 691.561 et seq. of the act of

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1941 (PA 1941, No 303) and subsequently, 600.2925 of CLS 1961. That statute was revamped in 1974.[1]

In Moyses, supra, 383 Mich at 314, the Court compared the 1941 and 1961 versions of the contribution statute and found that they were substantially identical, but also came to the conclusion that both enactments failed to achieve completely the proposed objective "of providing the substantive right of contribution between or among jointly liable or severally liable but not wilful

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[1] In the 1941 enactment, the Legislature adopted the 1939 Uniform Contribution Among Tortfeasors Act providing for contribution with respect to a judgment obtained against two or more persons jointly. See O'Dowd v General Motors Corp, 419 Mich 597, 603, 358 NW2d 553 (1984). In 1974, the Legislature repealed section 600.2925 of CLS 1961 concerning contribution between joint tortfeasors and replaced it with the MCL 600.2925a, which provided:

> (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rate share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rate share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability. [Emphasis provided.]

See Theophelis v Lansing General Hospital, 430 Mich 473, 487, 424 NW2d 797 (1988) (noting that the Legislature's 1974 revision expanded the right of contribution "by adopting [Moyses'] holding, which extended contribution as a matter of common law to wrongdoers, whether 'jointly' or 'severally' liable" and that "the Legislature made evident its purpose to incorporate, not abrogate, the then-existing common law as fashioned in Moyses") (Emphasis in original).

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tortfeasors." 383 Mich at 327 (Emphasis provided.)[2] In fact, the statute being interpreted (600.2925) only applied to joint tortfeasors, excepting insurers, but not for other unintentional wrongdoers. Id. at 331. In considering the statutory question of contribution among joint tortfeasors under the 1961 act, the Court in Moyses concluded that the contribution statute was not directly applicable to the case at hand because the original defendants and the proposed third-party defendants were not joint tortfeasors, but were at most only severally liable. However, without "disturbing section 2925" or resolving the "constitutional question" regarding the substantive right of contribution, the Court in Moyses corrected the "abominations" in the statute "by simply overruling the remnants of Michigan's common law rule which - loosely - has barred 'wrongdoers' from the equitable right of contribution where, by the standards of equity, that right exists generally." Id. at 329 (Emphasis provided.)

Thus, because the defendants in question were not joint tortfeasors as defined under the then existing contribution statute and because the Court did not want to "rewrite" the statute, Moyses simply returned the right to contribution to its equitable, common law roots, getting rid of the "remnants" of the rule that had

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[2] The Court noted that "the act of 1961 is no more than a duplicate of the act of 1941, save only for its having been fitted by (1) to third-party practice and, by (4), to the simultaneously effected union of law and equity." 383 Mich at 329.

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barred contribution among joint tortfeasors.[3] Caldwell, supra, 394 Mich at 419 ("Moyses returned the doctrine of contribution among non-intentional wrongdoers to the original equitable rules."); see also Jordan v Solventol Chemical Products, Inc., 74 Mich App 113, 117 n 4, 253 NW2d 676 (1977) (noting that Moyses overruled the common law bar against unintentional wrongdoers, "adopting the equitable principles of contribution"); L.B. Hunt v Chrysler Corp, 68 Mich App 744, 748-749, 244 NW2d 16 (1976) ("The conclusion we draw from Moyses is that there is a statutory right to contribution among Joint Tortfeasors, and outside the statutory coverage, a new common law right of contribution among unintentional 'wrongdoers' and the old common law prohibition among intentional tortfeasors.")

The point of this historical exegesis is to underscore the continuing validity of the common law right to contribution based upon equitable principles, which allow a party that has paid more than its fair share of a common burden to recoup the excess paid from other liable parties. Lorimer, supra, 246 Mich at 217. As set forth in Caldwell, the equitable rules require that there be (1) a "common liability" owed by the wrongdoers to the injured plaintiff and (2) payment or satisfaction by the party seeking contribution of the entire obligation or more than his or her aliquot share of

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[3] As noted by the Court in Caldwell, because Moyses recognized that the Legislature only partly abolished the common law bar against contribution, it "proceeded to complete the job that the Legislature had left unfinished." 394 Mich at 419. Accordingly, in Caldwell, the Court concluded that the trial court erred in dismissing the third-party complaint because "principles of equity were controlling" rather than "the common law bar to contribution among wrongdoers." Id. at 416.

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the common obligation. 394 Mich at 417.[4] See American National Fire Insurance Co v Frankenmuth Mutual Insurance Co, 199 Mich App 202, 218, 501 NW2d 237 (1993), aff'd but ordered not precedential, 445 Mich 91, 516 NW2d 52 (1994) (holding that "[a]long with the common law right of contribution, the right of contribution among nonintentional joint tortfeasors also exists by statute").[5]

The upshot of this undertaking is to show that no matter how the Supreme Court resolves the issues presented in Gerling, the third-party plaintiff in that case has a right to contribution, whether that contribution is based upon common law or statute. Thus, if the Court concludes that the abolition of joint liability

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[4] Caldwell described "common liability" in the following terms:

> If the jury believed that both original defendants and the third-party defendants were responsible for the injuries to the plaintiff, then a basis for allowing contribution would exist. All of the defendants would share a common liability to the plaintiff because the type of injuries suffered by the plaintiff are not apportionable amongst the various defendants on any rational basis. Where two or more individuals are responsible for an accident which produces a single indivisible injury, each individual wrongdoer may be held liable for the entire amount of the damages and thus each of the defendants shares a common liability with the others that are also responsible for the injury. [394 Mich at 420 n 5.]

[5] Notwithstanding the clear pronouncement from the Supreme Court regarding common law contribution based upon equitable principles, some panels of the Michigan Court of Appeals have amazingly transformed the right to contribution into a right "controlled entirely by statute, since there was no right to contribution at common law." Reurink Brothers Star Silo, Inc v Clinton County Rd Commissioners, 161 Mich App 67, 409 NW2d 725 (1987); see also Hastings Mut Ins Co v State Farm Ins Co, 177 Mich App 428, 437, 442 NW2d 684 (1989), citing Reurink, supra. The federal district court in CSX Transportation, Inc, v Union Tank Car Co, 173 F Supp 2d 696 (ED Mich, 2001) perpetuates the error, citing both these Court of Appeals' decisions.

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in most tort actions under MCLA 600.2956 eliminated the right of contribution among settling tortfeasors under MCLA 600.2925a, then the third-party plaintiff may still resort to well-entrenched common law principles grounded in equity as the basis for a contribution claim against other tortfeasors to determine their allocation of the fault. Markley v Oak Heath Care Investors of Coldwater, Inc, 255 Mich App 245, 256, 660 NW2d 344 (2003) (noting that "[t]he repeal of a statute revives the common law rule as it was before the statute was enacted"), quoting People v Reeves, 448 Mich 1, 8, 528 NW2d 160 (1995).

However, it is our view that the abolition of joint liability in most tort actions under MCLA 600.2956 did not eliminate the right of contribution among settling tortfeasors under MCLA 600.2925a. In answering this question, it is important not to overlook the fundamental feature of the contribution statute as equitable in nature. Because the contribution statute, in all of its various incarnations, has been inspired by equitable principles, it should be construed broadly.[6]

Giving a broad construction of the provisions of the contribution statute, it is clear that the Michigan's tort reform

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[6] Ordinarily, when a statute is held to be in derogation of the common law, it must be strictly construed. Theophelis, supra, 430 Mich at 484-485, quoting Rusinek v Schultz, Snyder & Steele Lumber Co, 411 Mich 502, 508, 309 NW2d 163 (1981) ("Statutes in derogation of the common law must be strictly construed . . . and will not be extended by implication to abrogate established rules of common law"). However, given that the contribution statute arose from equitable principles and given that Moyses returned the common law right to contribution to its original roots in equity, there is no rational basis to construe the statute strictly in derogation of the common law.

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legislation of 1995 did not undermine the statutory basis for contribution. Some preliminary observations are now in order at the outset. The first point is quite obvious, namely, two completely different statutes are in question here. One is MCLA 600.2956, which abolished joint liability in actions involving personal injury, property damage and wrongful death, retaining several liability to determine the pro-rata share of responsibility or "fair share liability." See Smiley v Corrigan, 248 Mich App 51, 55, 638 NW2d 151 (2002).

The other is MCLA 600.2925a, which embodies the right to contribution among tortfeasors jointly or severally liable in tort for the same injury to a person or property or the same wrongful death. Though the Legislature revised various statutes as part of its tort reform legislation of 1995, it tellingly left untouched the contribution statute, MCLA 600.2925a.[7] Simply put, the refusal of the Legislature, as part of its 1995 tort reform efforts, to make any changes in MCLA 600.2925a, while engaging in wholesale revisions of other statutes touching on the same topic area, must be construed as intentional. See Farrington v Total Petroleum, Inc, 442 Mich 201, 210, 501 NW2d 76 (1993) (noting that the omission of a provision in one part of a statute that is included in another part should be construed as intentional). Accordingly,

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[7] Through 1995 PA 161, the Michigan Legislature enacted MCLA 600.2956, which abolished joint liability and retained several liability. Through 1995 PA 161 and 1995 PA 249, MCLA 600.6304 was modified to provide that "[l]iability in an action to which this section applies is several only and not joint."

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because the Legislature has unambiguously provided for contribution among joint or several tortfeasors, the Court is not at liberty to ignore the plain language of the statute and must interpret it as written to give effect to the intent of the Legislature. Donajkowski v Alpena Power Co, 460 Mich 243, 250, 596 NW2d 574 (1999) (concluding "that the Legislature has unambiguously provided that contribution may be had between tortfeasors without regard to the intentional character of their acts, and we are not at liberty to ignore the plain language of the statute").[8]

The second point is that the statutes in question are concerned with entirely different matters. MCLA 600.2956 apportions the rights of the plaintiff vis a vis any defendants in the original cause of action alleging injury to a person, property or wrongful death in order to achieve "fair share liability." On the other hand, MCLA 600.2925a is concerned with "sorting out" the rights of multiple tortfeasors relative to one another and does not

---

[8] Even though the Legislature abolished the common law doctrine of joint and several liability among multiple tortfeasors in most instances and replaced it with the doctrine of several liability, MCLA 600.2956 , it did not thereby paint all related statutory provisions with the broad brush of tort reform. For example, the Legislature retained joint and several liability in medical malpractice cases where the plaintiff is without fault. MCLA 600.6304(6)(a). Given that the Legislature is presumed to be aware of the rules of statutory construction and also the consequences of its use or omission of statutory language when promulgating new laws, In re Messer Trust, 457 Mich 371, 380, 579 NW2d 73 (1998), the Legislature's decision not to amend MCLA 600.2925a as part of the tort reform package cannot be considered anything but intentional. Thus, under principles of statutory interpretation, the Court must conclude that the Legislature intended to preserve the right to contribution among tortfeasors jointly or severally liable in tort for the same injury to a person or property or the same wrongful death.

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come into play until the plaintiff in the original action has collected more than a pro-rata share from one of the defendants in the underlying action. See Markley, supra, 255 Mich App at 253 (noting that "contribution affixes the rights as between joint tortfeasors and not as between one tortfeasor and a plaintiff").

By its very nature, then, contribution involves a contingent right that triggers an independent cause of action, separate and distinct from the original plaintiff's cause of action, justifying a second opportunity for allocation. In short, because the statutes address entirely different matters, the abolition of the common law doctrine of joint and several liability in MCLA 600.2956 cannot be construed as leading to the elimination of the statutory right to contribution under MCLA 600.2925a.

Notwithstanding, the contention presumably is that the interaction of these two statutes has rendered ambiguous the plain language of MCLA 600.2925a. Stanton v Battle Creek, 27 Mich App 366, 371, 603 NW2d 285 (1999), aff'd 466 Mich 611, 647 NW2d 508 (2002). Because these two statutes relate to the same subject, they must be read together as one law under the in pari materia rule. State Treasurer v Schuster, 456 Mich 408, 417, 572 NW2d 628 (1998). Because the object of the in pari materia rule is to give effect to the legislative purpose, the construction that construes both statutes harmoniously is controlling. House Speaker v State Administrative Bd, 441 Mich 547, 568-569, 495 NW2d 539 (1993).

Clearly, the two statutes lend themselves to a construction

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that avoids any conflict. Such a construction was recently provided by Federal District Court Judge Paul Borman in CSX Transportation, Inc, v Union Tank Car Co, 173 F Supp 2d 696 (ED Mich, 2001).[9] In that case, CSX brought suit against several defendants alleging various claims, including contribution, arising from an incident in which a rail tank car caught fire. After the fire, CSX settled numerous suits with individuals and entities that suffered damages in the fire and then sought contribution from the other alleged tortfeasors. Reading the statutory provisions at issue in pari materia, Judge Borman concluded that the tort reform legislation in 1995 did not abolish a claim for contribution under MCLA 600.2925a:

> If one confuses the terms "common liability," "joint liability," "several liability," and "joint and several liability," one might come to the erroneous conclusion that contribution is no longer a viable cause of action in Michigan. However, that is not the case.
>
> Plaintiff CSXT is seeking an allocation of fault between the tortfeasors in this case. It is seeking neither "joint liability," nor "joint and several liability." Plaintiff CSXT is entitled, under Michigan law, to show that the Defendants and Plaintiff CSXT were/are severally liable (with an appropriate allocation of the percentages of fault) for the rail tank car accident in January of 2000.
>
> * * *
>
> In the instant case, Plaintiff CSXT is seeking an allocation of fault under Michigan law. Because CSXT has settled numerous lawsuits, paying the full share of each, CSXT can assert that it has paid more than its pro-rata share of the liability. Thus, under Michigan law, it has

[9] In this context, CSX Transportation is relied upon merely for the proposition that it reads both MCLA 600.2956 and MCR 600.2925a harmoniously, not that it necessarily provides the most persuasive interpretation available or that other interpretations harmonizing these two statutes cannot be made.

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a claim for contribution.

> If the purposes behind Michigan tort reform legislation were speedy settlement of suits, and allocation of fault, thwarting CSXT's ability to seek contribution defies both of those objectives. First, without the possibility of seeking "reimbursement" from other tortfeasors, CSXT would have no interest in seeking a speedy settlement of claims. Further, allowing CSXT to bring a claim for contribution furthers the purpose of holding tortfeasors responsible for their share of the liability. [173 F Supp 2d at 699-700.]

See also Jonas v Carissimi, 219 Mich App 546, 557 NW2d 148 (1996) (holding that settlement of the underlying case does not forestall contribution action).

Further, there is perhaps an even stronger reason why the abolition of the common law doctrine of joint and several liability in MCLA 600.2956 does not eliminate the statutory right to contribution under MCLA 600.2925a, which is based upon the fact that well-established common law principles cannot be abolished by implication, especially when they are embodied in the plain language of a statute. Marquis v Hartford Accident & Indemnity, 444 Mich 638, 652-653, 513 NW2d 799 (1994). As clearly stated in MCLA 600.2925a(1),

> (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.(Emphasis provided.)

Because the language of the contribution statute, MCLA 600.2925a, transparently incorporates the well-entrenched equitable principles grounding the common law right to contribution, it is

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beyond question that such principles cannot be abolished by the remotest of implications present in a completely different statute, MCLA 600.2956.

Thus, under MCLA 600.2925a(2), where a tortfeasor has discharged a common liability as part of a settlement with the original plaintiff, that tortfeasor is entitled to recover from his "co-obligors" the excess of that which has been paid.[10] As stated in MCLA 600.2925a(3),

> (3) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor if any of the following circumstances exist:
>
> (a) The liability of the contributee for the injury or wrongful death is not extinguished by the settlement.
>
> (b) A reasonable effort was not made to notify the contributee of the pendency of the settlement negotiations.
>
> (c) The contributee was not given a reasonable opportunity to participate in the settlement negotiations.
>
> (d) The settlement was not made in good faith.

Where none of the aforementioned circumstances that would deny recovery is applicable, as in Gerling, the third-party plaintiff is statutorily entitled to recover contribution from other tortfeasors

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[10] MCLA 600.2925a(2) provides:

> (2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.

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subject to the common liability.[11]

Further, as provided for expressly by the contribution statute, the third-party plaintiff has the right to enforce the right of contribution against other tortfeasors subject to the common liability in a separate action, whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death. The very existence of MCLA 600.2925a(1) strongly implicates the possibility of a later, separate action which may allow the jury, at long last, to make the tort allocation decision at that time.

In a contribution action brought by a joint tortfeasor who has entered into settlement, such as the third-party plaintiff in Gerling, any defendants may assert, under MCLA 600.2925a(4), the defenses to his alleged liability for the injury or wrongful death.[12]

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[11] Further, the third-party plaintiff, as in Gerling, is entitled to recover under MCLA 600.2925a(6):

> (6) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, is subrogated to the tort-feasort's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. It may assert this right either in its own name or in the name of its insured. This provision does not limit or impair any right of subrogation arising from any other relationship.

[12] MCLA 600.2925a(4) provides:

> (4) In an action to recover contribution commenced by a tort-feasor who has entered into a settlement, the defendant may assert the defenses set forth in subsection (3) and any other defense he may have to his alleged liability for such injury

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Moreover, it is not essential that the joint tortfeasors subject to the contribution action were parties to the underlying action brought by the original plaintiff. As clearly stated in Caldwell, supra, 394 Mich at 401, the original plaintiff's caprice in choosing to join or not a third-party defendant does not (and should not) control the third-party plaintiff's right to contribution. Because contribution constitutes an independent action, the third-party plaintiff has to establish his right to contribution as in any other civil case. Thus, the third-party plaintiff has the burden of proving by a preponderance of the evidence that he is entitled to contribution from joint or several tortfeasors.

While the right to contribution is firmly anchored in the common law and by statute, the final question that remains is whether the common law right to contribution continues to exist in tandem alongside the statutory right to contribution.

Although the Supreme Court has not yet spoken on the subject, the Court of Appeals in American National Fire Insurance Co, supra, 199 Mich App at 202 presciently recognized that the two vehicles, statutory and common law, exist side-by-side. Because there is no indication that the Legislature intended that the contribution statute supersede and replace the common law right to contribution where the common law principles clearly inspired the establishment of the statutory right to contribution, there is

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or wrongful death.

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nothing that precludes the recognition of a right to contribution based under both common law and statute. Cf. Markley, supra, 255 Mich App at 256-257 ("With tort reform and the switch to several liability, it is logical to conclude that common law setoff in joint and several liability cases remained the law, where the new legislation was silent, where application of the common law rule does not conflict with any current statutes concerning tort law, and where a plaintiff is conceivably overcompensated for its injury should the rule not be applied.")

CONCLUSION AND RELIEF

The recent spate of Tort Reform Statutes did not portend the eclipse of contribution rights, either by way of any statutory analysis or by virtue of displacement of the rights of common law Contribution found to exist by Moyses and by Caldwell.

To repeat, if a recalcitrant, but liable tortfeasor refuses to settle and the settling defendants pony up more than their ratable amounts owed, it would be a ghastly injustice for the Peacemakers to advance the settlement funds without recourse as they then would be unable to recoup their aliquot share from the stubborn tortfeasor, ostensibly because no MCLA 600.6034 or MCLA 600.2957 or MCR 2.112(K) allocation had ever been performed because the original case ended prematurely, naturally, as in Gerling. The common law covers this point adequately, and we trust the Supreme Court to recognize that the parallel universe of the common law approach validated by Moyses, Caldwell, and American National still exists.

Respectfully submitted,

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Dated: October 1, 2004

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IN THE SUPREME COURT

FOR THE STATE OF MICHIGAN

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG, Subrogee of the University of Michigan Regents, Plaintiff/Appellant, v CECIL R. LAWSON and AMERICAN BEAUTY TURF NURSERIES, INC., Defendants/Appellees.	Supreme Court Docket No. 122938 COA No: 237284 Washtenaw Circuit Court No 99-11061-CZ

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PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

DOLORES J. BADER, being first duly sworn, deposes and says that on the 1st day of October, 2004, she caused to be served a copy of the **MOTION TO ACCEPT BRIEF OF AMICUS CURIAE, THE DETROIT**

EDISON COMPANY; BRIEF OF AMICUS CURIAE, THE DETROIT EDISON COMPANY

and this **PROOF OF SERVICE**, upon:

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by immediate facsimile transmission and also by placing said copy in an envelope correctly and plainly addressed to the above noted attorneys, and depositing said envelope in the United States Mail with postage thereon fully prepaid.

Further Deponent sayeth naught.

Dolores J. Bader

DOLORES J. BADER

Subscribed and sworn to before me
this 1st day of October, 2004.

Laurie A. Fuller

LAURIE A. FULLER, Notary Public
Wayne County, Michigan
My Commission Expires: 04/29/07
Acting in Wayne County, MI

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